No. 85-2014

Supreme Court, U.S.
FILED
JUN 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1985

MICHAEL VAN McDOUGALL,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF MECKLENBURG COUNTY, NORTH CAROLINA

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QUESTIONS PRESENTED

I.

WHETHER A DEFENDANT MAY BE SENTENCED TO DEATH WHEN HIS LEAD COUNSEL AT TRIAL HAD IN THE SIX MONTHS PRIOR TO TRIAL TWICE BEEN THE SUBJECT OF STATE BAR SUSPENSION ORDERS; MADE NUMEROUS VISITS TO THE HOSPITAL EMERGENCY ROOM AND INGESTED MIND ALTERING DRUGS DURING THE DEFENDANT'S TRIAL; ENGAGED IN ILLEGAL AND UNETHICAL BEHAVIOR DURING HIS REPRESENTATION OF DEFENDANT; AND DELIVERED AN INCOHERENT AND OFFENSIVE CONCLUDING SUMMATION DURING THE SENTENCING HEARING.

II.

WHETHER A DEFENDANT MAY BE SENTENCED TO DEATH UNDER A SYSTEM WHICH ALLOWS JURORS TO RETURN VERDICTS OF THE LESSER INCLUDED OFFENSE OF SECOND DEGREE MURDER EVEN WHEN THERE IS NO EVIDENCE PRESENTED TO SUPPORT THE LESSER VERDICT.

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IN THE

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October Term, 1985

MICHAEL VAN McDOUGALL,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF MECKLENBURG COUNTY, NORTH CAROLINA

Petitioner Michael Van McDougall, respectfully prays that a writ of certiorari be issued to review the judgment of the Superior Court of Mecklenburg County, North Carolina in this case.

CITATIONS TO OPINIONS BELOW

The Memorandum Opinion and Order of the Superior Court of Mecklenburg County, North Carolina, denying petitioner's motion for appropriate relief is unreported but is attached as Appendix A.

The Order of the North Carolina Supreme Court denying petitioner's petition for writ of certiorari to review the judgment of the Superior Court of Mecklenburg County is not yet reported, but is attached as Appendix B.

JURISDICTION

The Order of the North Carolina Supreme Court denying petitioner's petition for writ of certiorari was entered

in conference on April 7, 1986, and was issued on April 14, 1986. A copy is attached as Appendix B. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1257(3). Petitioner has asserted below and now asserts a deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense;

the Eight Amendment, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted;

and the Fourteenth Amendment, which provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

A. The Course of Prior Proceedings

Petitioner was convicted of first-degree murder, kidnapping, and assault with a deadly weapon in the Superior

Court of Mecklenburg County, North Carolina, at the 9 June 1980 session. He was sentenced to death for murder and given prison sentences for the other charges.

Petitioner appealed to the North Carolina Supreme Court, which affirmed the convictions and sentence of death. *State v. McDougall,* 308 N.C. 1, 301 S.E.2d 308 (1983) (Exum-J., dissenting as to the sentence of death). This Court denied certiorari in *McDougall v. North Carolina,* 464 U.S. 865, 104 S.Ct. 147, 78 L.Ed.2d 865 (1983).

Petitioner filed a post-conviction proceeding in the Superior Court of Mecklenburg County on 27 February 1984, in the form of a "motion for appropriate relief" pursuant to N.C.G.S. §15A-1411 *et seq.* After an evidentiary hearing on the claims, before the Honorable Frank W. Snepp, the Superior Court of Mecklenburg County denied petitioner's claims by order entered August 9, 1985 (Appendix A). Petitioner filed a timely petition for writ of certiorari in the North Carolina Supreme Court which was denied without opinion by order entered 7 April 1986 (Appendix B).

B. The Evidence Presented at Trial

In the early morning hours of 21 August 1979 petitioner was arrested and charged with killing one young woman and seriously injuring another in a knife attack that took place in the community where he resided with his wife and child. Petitioner was arrested at the scene and did not deny involvement in the tragedy. His plea of not guilty by reason of insanity was not accepted by the jury's special verdict. After three weeks of trial, petitioner was acquitted on some charges, but convicted of first-degree murder, kidnapping, and assault with a deadly weapon with intent to kill inflicting serious injury.

At the sentencing hearing, petitioner offered evidence of mental problems exacerbated by heavy ingestion of cocaine on the evening of 20 August 1979. The jury found both aggravating and mitigating factors. However, under North Carolina law, because the jury determined that the mitigating factors did not outweigh the aggravating factors, the imposition of the death sentence was automatic.

C. **The Evidence Presented in Post Conviction Hearing**

Petitioner presented evidence at the hearing on his motion for appropriate relief that the unique set of circumstances which infected his trial combined to compel the conclusion that petitioner was effectively denied representation of counsel by operation of law.

The evidence showed that shortly after petitioner's arrest his family retained a Charlotte civil attorney, Wallace Osborne, who associated criminal lawyer Michael Scofield. Osborne and Scofield began preparation for the trial, focusing their effort on the penalty phase presentation.

At that time, Jerome "Jerry" Paul was not involved in petitioner's defense. Rather, Paul was fending off his own legal problems from five ethical complaints filed against him by the North Carolina State Bar. In this regard, the Superior Court found that Paul had for a long time suffered from severe migraine headaches. In 1977, after the illness and death of his son, Paul also experienced deep depression. In May, 1979, feeling he was no longer able to practice law, he moved to New York. While in New York he was under psychiatric treatment and was hospitalized for migraine on several occasions. During this period, Paul neglected his professional duties. As a result grievances were lodged against him with the North Carolina State Bar, and disciplinary proceedings were instituted.

These proceedings were pending against Paul during his representation of petitioner. (App. A, p. 5a)

In November 1979, Paul failed to appear at a hearing before the State Bar on these charges, sending word through his psychiatrist, Dr. Teich, that he was disabled from repeated, severe migraine headaches which intermittently rendered him unable to function even with a reduced workload prescribed by the physician.[1]

The Disciplinary Hearing Committee nevertheless took evidence at the November hearing and, upon finding that Paul had failed to provide legal services for which he had charged clients, ordered Paul suspended from the practice of law in North Carolina for two years effective 9 November 1979. In February 1980, Paul finally responded to the disciplinary charges, filing pleadings in each of the five cases, including a request to reopen the November hearing, asserting that he had been "incapacitated," and "physically and psychologically" unable to deal with the complaints prior to that time.[2]

In a disciplinary hearing on four of the charges, before the State Bar in May 1980, just one month before petitioner's trial, Dr. Teich testified that Paul became totally "incapacitated" while experiencing migraines and that he was "depressed" and "suicidal." After this second round of hearings, Paul was given two reprimands and his license to practice law was suspended a second time on May 23, 1980. (App. A, p. 6a)

It was during the Spring of 1980, while defending against the State Bar's charges, that Paul met with peti-

[1] Supporting documentation for all references to Paul's disciplinary proceedings is found in the State Bar records that were accepted into evidence as Petitioner's Exhibit #1 below and which were certified to the North Carolina Supreme Court.

[2] Footnote one, *supra.*

tioner in the state mental hospital. Paul advised McDougall that he had tried 150 first degree capital cases, including 16 insanity defenses, and "won them all." He also falsely told petitioner's family that Scofield and Osborne "hadn't done anything." (T 227)[3] Paul told petitioner he would come into the case only if he were "to have control" (T 227); to the family, Paul painted a picture of desperation and an inevitable loss if he was not retained. (T 65) The Superior Court found that:

> Jerry Paul during the period of his representation of defendant violated a number of the canons of the Code of Professional Responsibility of the North Carolina State Bar. By "puffing his wares" to defendant and his mother, he violated DR2-101(A), and DR2-103(A)(1) and (C). . . (App. 4, p. 14a)

So, while then-lead counsel was on vacation, Paul got himself hired to represent petitioner. He immediately took command, assigning Scofield to a "secondary role" and Osborne's role to "virtually nothing." (T 121-122)

Paul totally disregarded the other lawyers' views (T 131), completely changed the case strategy and decided to go for acquittal based on a strange insanity theory that he evolved with Dr. Teich. (T 132)

About the same time, Paul went to Georgia to interview petitioner's family. There, the suspicions of Paul's drug use (which was later confirmed) first surfaced. After long visits to the bathroom, Paul would emerge mumbling unintelligibly (T 67) and would lose contact with family members. (T 248) At one point, while supposedly seeking a breath of fresh air, Paul crashed through both the window and storm window in petitioner's mother's house. (T 67)

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[3]Transcript references are to the transcript of proceedings in the post-conviction hearing in Mecklenburg County Superior Court.

On 23 May 1980 a third State Bar hearing was convened — this time to reconsider Paul's original suspension. Paul offered testimony about lights flashing in his mind, a debilitating depression, indescribable pain, and his need to lie in bed "anywhere from two to three days to a week or so" after experiencing migraines. The Disciplinary Hearing Committee entered an order, sustaining the November 9 suspension of Paul's license, on June 9, 1980 — the day that petitioner's trial began in Charlotte.[4]

Petitioner's trial was a placid surface that masked deeply troubled waters. Paul's strange behavior caused shouting matches between counsel (T 68), a complete revamping of the defense strategy (T 134), and a near fist fight between petitioner and one of the lawyers about Paul's insistence on filing a federal suit, while the trial was in progress, against the presiding judge. (T 125) In short, petitioner's lawyers admitted to "fighting with each other all the time." (T 141)

A juristic psychologist and a clinical psychologist working for the defense, both of whom have testified in many previous cases, told about the "turmoil" (T 38), "antagonism" (T 39), and "hostility," (T 48), as well as a total lack of witness preparation by counsel. (T 47, 102)

During the conduct of the trial, Paul became acutely ill, frequenting local hospitals, taking a large amount of prescription drugs, and also taking illegal drugs. The Superior Court found that the evidence showed Paul had attacks of migraines during the trial; that on four occasions in June and five in July he received treatment for the condition at the emergency rooms of Charlotte hospitals; and medications, including narcotics, were administered to him under a doctor's supervision. (App. A, p. 8a).

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[4]Footnote one, *supra.*

Records subpoenaed for the post-conviction hearing showed Paul received emergency room treatment for migraine headaches on at least the following dates during the trial: 11 June, 14 June, 15 June, 26 June, 4 July, 7 July, 14 July, 16 July, and 20 July. (T 180) The local director of the Charlotte Treatment Center noted the following drugs which were prescribed for Paul during the trial: Phenergan, Motrin, Demerol, Nitrous Oxide, Tylenol with codeine, Percocet, Gynergen, Dilaudid, and Compazine. Demerol is "a synthetic narcotic, very similar to morphine"; Phenergan "usually doubles the effectiveness of the narcotic given with it"; Percocet is a "synthetic narcotic substance" which is also "potentiated" or doubled in effect by the Phenergan; and by Gynergen and Compazine as well. (T 197)

Paul's illness and drug use affected his performance at petitioner's trial. As the case wore on, the headaches came more frequently and Paul had to leave court more often. (T 173) At least once, Paul did not show up at all on the morning he was to examine an expert. (T 128) On other occasions he walked out complaining of not being able to tolerate the pain; co-counsel would later find him sprawled on the floor of their office sound asleep. (T 136) One expert, who took Paul on one of his emergency room trips, said he acted "zonked out" like a "zombie." (T 45)

During the trial, petitioner's mother confronted Paul, who admitted giving McDougall illegal drugs (T 76) – and Paul did so again later, in a holding cell near the courtroom. (T 230) The Superior Court specifically found that "[a]ccording to the testimony of the defendant, Paul also committed the felony of furnishing a controlled substance to an inmate of a jail, in violation of N.C.G.S. 14-258.1,". (App. A, p. 14a) After learning from a deputy sheriff about Paul's drug dealings in the jail, Scofield stopped

meeting with petitioner and Paul during the trial, "to protect my reputation." (T 131)[5]

Whether or not in response to the large amount of drugs he was taking, Paul repeatedly importuned petitioner (T 232), petitioner's wife (T 233), and petitioner's mother (T 72) to commit perjury to support the insanity defense he had concocted. In violation of the trial judge's specific order, Paul gave certain tapes to the television station, asserting that if he couldn't win the case in the courtroom, he would win it in the news media. (T 74) The Superior Court found that Jerry Paul violated ethical standards by his statements to the media, DR7-107, and by suggesting perjury to witnesses. (App. A, p. 14a)

Finally, assigning himself the final argument, Paul embarked on a rambling, disjointed personal history in which he portrayed himself as a great civil rights leader. He said little or nothing reasonably calculated to encourage the jury to spare petitioner's life. Paul's argument included such statements as:

> . . . the death penalty is the tool of the Facists . . . why do you think that Facists want the death penalty? It's because they can kill the minorities . . . Every human being who believes in capital punishment loves killing, and the only reason they believe in capital punishment is because they get a kick out of it . . . we did a long study on Nazi Germany to discover why people turn to Facism and turn to Nazism . . . one of the dividing lines, the main one, was whether or not you're in favor of the death penalty . . . those

[5]Paul had previously banished Osborne from strategy sessions because of a concern that he was a spy for the prosecution (T 210), thus leaving Paul as the only attorney meeting with petitioner.

> people who were in favor of the death penalty are most apt to become Fascists . . . .

(App. C, p. 4c, 7c, 13c)

Regarding Paul's closing argument, although the Superior Court found that overall the argument was within the range of competence of attorneys, the Court also found:

> The speech was polemical – a direct, frontal attack against the death penalty. In strong language, Paul labelled it an instrument of a ruling class used against minorities, such as blacks, and to which he, as a "freedom fighter" and disciple of Martin Luther King, was vehemently opposed. It abounded with references to his personal beliefs and disbeliefs, political, social and religious, in defiance of DR7-106C(4) of the *Code of Professional Responsibility.*

(App. A, p. 18a)

Scofield described Paul's closing as "tactless, ill-advised, stupid. . . ." (T 129) and Osborne testified it was "extremely foreign to my philosophy and my beliefs." (T 212-213)[6] Both co-counsel thought the result would have been, or might have been, different if Paul had not entered the case

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[6]In an Affidavit filed at the hearing before the Superior Court, Charlotte attorney Allen Bailey, a trial lawyer for 34 years and past president of the N.C. Academy of Trial Lawyers, concluded that Paul's closing argument "failed to meet the standard of legal practice in Mecklenburg . . . or any other county in the state . . . ." He viewed the argument as "so outrageous in and of itself that it makes Paul's performance as Counsel, at least during the penalty phase, inadequate and incompetent."

Judge Ferrell, the presiding judge at petitioner's trial, stated in a counter-affidavit filed by the State, that Jerry Paul's argument was appropriate and within the range of competence.

and carried on his string of drug-induced bizarre behavior. (T 140, 157)

In conclusion the Superior Court found that:

> [I]f the issue before me were the ethical and moral behavior of Jerry Paul, I would under the evidence find him guilty as charged by the defendant in those respects.
>
> That is not the issue. The question is whether Paul's transgressions resulted in the defendant's being denied his constitutional right to effective assistance of counsel. I have determined that they did not. Other aspects of his behavior must be left to another tribunal.
> (App. A, p. 26a)

DISCUSSION OF QUESTIONS PRESENTED

I.

WHETHER A DEFENDANT MAY BE SENTENCED TO DEATH WHEN HIS LEAD COUNSEL AT TRIAL HAD IN THE SIX MONTHS PRIOR TO TRIAL TWICE BEEN THE SUBJECT OF STATE BAR SUSPENSION ORDERS; MADE NUMEROUS VISITS TO THE HOSPITAL EMERGENCY ROOM AND INGESTED MIND ALTERING DRUGS DURING THE DEFENDANT'S TRIAL; ENGAGED IN ILLEGAL AND UNETHICAL BEHAVIOR DURING HIS REPRESENTATION OF DEFENDANT; AND DELIVERED AN INCOHERENT AND OFFENSIVE CONCLUDING SUMMATION DURING THE SENTENCING HEARING.

A. How The Federal Question Was Raised And Decided Below.

Petitioner's complaints about the constitutionality of his representation by his attorney, Jerry Paul, were raised generally in his Motion for Appropriate Relief and were argued extensively in his Memo filed with the Superior

Court. The state did not file a response to petitioner's Motion for Appropriate Relief, but argued these issues in the State's Brief in Opposition to Motion for Appropriate Relief. The Superior Court denied petitioner's contentions on this issue on the merits (Appendix A).

On petition for certiorari to the North Carolina Supreme Court from this denial, the merits of the issue were again briefed and presented by both parties. The petition for writ of certiorari was denied without opinion. (Appendix B)

B. **Reasons For Granting The Writ.**

In *United States v. Cronic,* 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), this Court held that there are cases where the circumstances surrounding the representation of a defendant by counsel are such as to justify a presumption of prejudice. *Id.,* 104 S.Ct. at 2048, 80 L.Ed.2d at 669. Given the uncontradicted evidence regarding the circumstances which surrounded petitioner's representation by Paul, the question presented here is whether the presumption recognized in *Cronic* should be applied to overturn petitioner's sentence of death.[7]

As the Superior Court found, during the months prior to petitioner's trial Jerry Paul, who talked his way into the role of lead counsel by "puffing his wares" (App. A, p. 14a), was twice ordered suspended by the North Carolina State Bar for neglect of his professional duties. The last suspension was entered just weeks before petitioner's trial (App. A, p. 6a). The Superior Court found, however, that

[7]In the proceedings below petitioner raised this claim as a challenge to both his conviction and sentence. In this Court petitioner only challenges the validity of his death sentence.

because Paul "took advantage of every procedure possible to defer a final decision as to his suspension from practice" (App. A, p. 7a), petitioner's claim that he was denied the assistance of counsel because he was represented by an unlicensed attorney had to be rejected (App. A, p. 8a). Petitioner does not here challenge this determination of state law.

This Court has emphasized that the full realization of a defendant's right to counsel is a prerequisite for a fair trial, both under the due process clause of the Fourteenth Amendment and the Sixth Amendment right to counsel. *Powell v. Alabama,* 287 U.S. 45, 68-69, 53 S.Ct. 55, 63-64, 77 L.Ed 158, 170 (1932); See, also: *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Though this Court has never issued an opinion directly on point, there is strong authority from federal and state courts that representation by an unlicensed attorney is not the representation of counsel contemplated by the Sixth Amendment; *See,* e.g. *Solina v. United States,* 709 F.2d 160 (2nd Cir. 1983) *Harrison v. United States,* 359 F.2d 214 (D.C. Cir. 1965); *Huckleberry v. State of Florida,* 337 So.2d 400 (Fla.App. 1976); *Baker v. State,* 130 P. 820 (Okl. 1912). The fact that petitioner's lead counsel had actually been ordered suspended from practice at the time of petitioner's trial, considered in light of the other circumstances at petitioner's trial, compels a finding that the petitioner's right to counsel was not adequately protected.

At the time of petitioner's trial the North Carolina State Bar had already determined that Paul should not have been allowed to represent a defendant in even the most insignificant misdemeanor case. Paul's presence therefore as lead counsel in petitioner's capital case both erodes con-

fidence in the outcome of the sentencing proceeding required by the Sixth Amendment, *Strickland v. Washington, supra,* and undermines the reliability of the process which led to the imposition of the death penalty, in violation of the Eighth Amendment. See e.g., *Spaziano v. Florida,* 468 U.S. ____,. 104 S.Ct. 3154, 3160, 82 L.Ed.2d 340, 349 (1984); *Woodson v. North Carolina,* 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944, 961 (1976).

The State Bar's judgment that Paul was unfit to practice law is but one circumstance that petitioner relies on to invoke a presumption of prejudice. Of equal importance are Paul's activities during the petitioner's trial and sentencing hearing which demonstrated that Paul's unfitness to fulfill his professional responsibilities continued throughout the course of those proceedings.

At that hearing on petitioner's motion for appropriate relief, petitioner presented evidence of Paul's impaired physical state at the time of petitioner's trial and Paul's ingestion of narcotic drugs. Ironically, in the weeks before petitioner's trial, Paul defended himself before the State Bar, against the charges that he neglected his other clients' interests, on the basis that he had been rendered incompetent by his severe migraine headaches. The Superior Court noted that Paul and his physician assumed Paul had recovered from this condition prior to petitioner's trial. However, that assumption is belied by the Court's further finding that migraines caused Paul to make nine trips to a hospital emergency room during petitioner's trial and that during this time Paul ingested a number of medications, including narcotics. (App. A, p. 8a)

The Superior Court, after reviewing all of the evidence at the hearing on petitioner's motion for appropriate relief, also found that during petitioner's trial Paul had violated a number of ethical standards of the North Carolina

State Bar and may even have committed a felony during the course of his representation of petitioner (App. A, p. 14a)

Recently, in *Nix v. Whiteside*, 475 U.S. ____, 106 S.Ct. 988, 994, 89 L.Ed.2d 123, 134 (1986) Chief Justice Burger, after affirming that ". . . breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel", noted that "[i]n some future case challenging attorney conduct in the course of a state court trial, we may need to define with greater precision the weight to be given to recognized canons of ethics, the standards established by the State in statute or professional codes, and the Sixth Amendment, in defining the proper scope and limits on that conduct." Petitioner's case provides this Court with a compelling opportunity to decide this question.

Finally, there is Paul's argument to the jury at the end of petitioner's sentencing trial. This disjointed and patently offensive oration, which had little to do with petitioner or the crime at issue and much to do with Paul's vision of his own place in history, amply demonstrates that Paul was severely impaired. His physical, mental, legal and ethical problems truly rendered him incapable of fulfilling his legal obligations to petitioner.

No defendant should be sentenced to death when being represented by an attorney who had twice been the subject of State Bar suspension orders, who was physically incapacitated by illness and medications at the time of that defendant's trial, who violated legal and ethical standards throughout that defendant's trial, and who was demonstrably unfit to represent any client in a court of law. The Sixth, Eighth, and Fourteenth Amendments all compel a decision that a death sentence entered under these circumstances cannot be allowed to stand.

II.

WHETHER A DEFENDANT MAY BE SENTENCED TO DEATH UNDER A SYSTEM WHICH ALLOWS JURORS TO RETURN VERDICTS OF THE LESSER INCLUDED OFFENSE OF SECOND DEGREE MURDER EVEN WHEN THERE IS NO EVIDENCE PRESENTED TO SUPPORT THE LESSER VERDICT.

A. How The Federal Question Was Raised And Decided Below.

Petitioner pleaded in his Motion For Appropriate Relief that the capital punishment scheme in effect in North Carolina at the time of his trial violated the Eighth and Fourteenth Amendments because juries in premeditated and deliberated first degree murder cases were always instructed to consider a verdict of second degree murder, even if there was no evidence presented at the trial to support such a verdict. The Superior Court denied this contention, finding that the evidence at petitioner's trial supported submission of the second-degree verdict to the jury. The Superior Court referred to N.C.G.S. §15A-1419(a)(3), which permits, but does not require, a finding of waiver if an issue was not raised on direct appeal, but did not specifically rely on this provision.[8] Instead, the Superior Court ruled on the merits of the Motion.[9] (Ap-

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[8]After rejecting petitioner's contentions on the merits, and before again ruling on the merits, the Court stated: "Finally, as to this contention the defendant was in a position to adequately raise this issue upon appeal, but did not do so, N.C.G.S. §15A-1419(a)(3)." This statute authorizes a judge to deny a Motion for Appropriate Relief upon a finding that the issue was not raised in a previous appeal, but subsection (b) of the statute makes clear that this is a discretionary decision: the judge "may" deny relief but is not required to do so.

[9]After the above reference to N.C.G.S. §15A-14191(a)(3), the Superior Court stated: "Therefore, I conclude that this contention is without merit, as a matter of law.' (App. A, p. 23a)

pendix A) The issue was again raised and briefed in petitioner's Petition For Writ of Certiorari to the North Carolina Supreme Court. That petition was denied without opinion. (Appendix B)

B. **Reasons For Granting The Writ.**

In 1980, at the time of petitioner's trial, whenever a defendant was tried in North Carolina for first degree murder on the theory of premeditation and deliberation the trial court was required to instruct the jury on second degree murder. The jury had to be allowed to return a verdict of second degree murder, even if there was no evidence at all to support the charge on the lesser offense. *State v. Poole,* 298 N.C. 254, 258 S.E.2d 339 (1979); *State v. Keller,* 297 N.C. 674, 256 S.E.2d 710 (1979); *State v. Harris,* 290 N.C. 718, 228 S.E.2d 424 (1976). This requirement of the automatic submission of a lesser included offense regardless of the evidence was limited to first degree murder cases. *State v. Keller,* 297 N.C. at 678, 256 S.E.2d at 713.

This automatic inclusion rule renders the North Carolina death penalty scheme in effect at the time of petitioner's trial and sentencing unconstitutional under *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), because it allowed juries to capriciously, arbitrarily, and without proper standards choose which defendants would live and which would die. This exact procedure was held unconstitutional in *Roberts v. Louisiana,* 428 U.S. 325, 334-335, 96 S.Ct. 3001, 3006-7, 49 L.Ed.2d 974, 982 (1976), where a plurality of this Court held that such a procedure "invites the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel the death penalty is inappropriate" and thus allows for a capricious and arbitrary exercise of a capital

jury's sentencing discretion. This holding was reaffirmed by a seven-member majority of this Court six years later in *Hopper v. Evans,* 456 U.S. 605, 611, 102 S.Ct. 2049, 2053, 72 L.Ed.2d 367, 373 (1982).

In 1983, in *State v. Strickland,* 307 N.C. 274, 298 S.E.2d 645 (1983), the North Carolina Supreme Court acknowledged that the practice of automatically instructing jurors on second degree murder in every first degree premeditated and deliberated murder case was "suspect of being constitutionally impermissible" under *Roberts* and *Hopper,* and struck down this practice. *Id.* 307 N.C. at 289-290, 298 S.E.2d at 655-56. In doing so the North Carolina Supreme Court acknowledged that this practice had been in effect from at least 1976 until 1983, a period which includes the time of petitioner's trial.

The Superior Court based its denial of petitioner's claim regarding this "automatic instruction" rule on the basis that there was evidence at petitioner's trial that warranted submission of the second degree verdict. The argument that there is no constitutional violation if the second degree verdict is properly considered was adopted by the North Carolina Supreme Court in *State v. Kirkley,* 308 N.C. 196, 222, 302 S.E.2d 144, 159 (1983).

This position totally misreads this Court's opinion in *Roberts.* In both *Roberts* and *Furman* this Court held that *any* death sentences obtained under a system which permits juries to arbitrarily and capriciously choose which defendants are to die *must* be invalidated. *Roberts* was specifically concerned with the *systemic* arbitrariness contained in a system which allowed a jury to return an unsupported lesser verdict, and thus to avoid even the consideration of the death peanlty, in every murder case. The issue is not whether the lesser verdict is supported in any

single case, but whether the system as a whole is operating to eliminate, or at least lessen, the presence of arbitrariness and caprice.

This case therefore presents this Court with an opportunity to decide whether the dictates of the Eighth Amendment as elucidated in *Furman* and *Roberts* were being complied with in North Carolina at the time of petitioner's trial. It is an issue of great importance which requires an analysis of the application of fundamental Eighth Amendment jurisprudence, and it is one which requires review by this Court.

CONCLUSION

Petitioner was sentenced to death in a trial where he was represented by counsel who had twice been subject to State Bar suspension orders, who during petitioner's trial was physically impaired by illness and medications, and who violated ethical standards throughout petitioner's trial. Review by this Court should be granted to determine whether these circumstances effectively denied petitioner representation by counsel as a matter of law.

Further, petitioner was sentenced to death under a capital punishment scheme that required juries in premeditated and deliberated first degree murder cases to consider a verdict of second degree murder regardless of the evidence. This Court should grant review to whether this violated petitioner's Eighth Amendment rights.

For these reasons, petitioner respectfully prays that the Court grant the writ of certiorari.

Respectfully submitted,

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June 6, 1986

APPENDIX A

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
COUNTY OF MECKLENBURG	SUPERIOR COURT DIVISION
	79-CRS-47697
	79-CRS-4773
	79-CRS-67081

STATE OF NORTH CAROLINA)
)
vs.)
)
MICHAEL VAN McDOUGALL,)
)
Defendant)

The defendant filed a motion for appropriate relief 27 February 1984. Pursuant to order of the court, a plenary hearing was held before me at Charlotte on 13 November 1984. The defendant, represented by James C. Fuller of the Wake County Bar, and Richard Rosen, of the Orange County Bar, was present. The State was represented by Joan Byers and Barry McNeill, of the Attorney General's office, and by Gentry Caudill, Assistant District Attorney, Twenty-Sixth Judicial District.

Evidence was presented by the defendant and the State. At its conclusion, it was stipulated that each party could submit further documentary evidence; that I would then hear arguments, and enter my order out of term and out of district.

Due to scheduling conflicts, final arguments were, by agreement, heard 29 July 1985, in Asheville.

I. CONTENTIONS:

The defendant, in his motion, contended that he was denied his constitutional rights in four respects. Two, based upon the trial court's refusal to grant continuances, were specifically abandoned at the hearing.

1. The defendant was denied his right to effective assistance of counsel in that;

   A. His lead counsel, Jerry Paul, was not licensed to practice law in North Carolina at the time of his trial.

   B. Paul was mentally and physically incapacitated during the trial.

   C. Paul had conflicts of interest.

   D. Paul's unethical conduct during the trial amounted to a deprivation of effective assistance of counsel and the Court, under its supervisory power over attorneys, should award defendant a new trial.

   E. Paul's closing argument at the penalty phase constituted actual ineffective assistance of counsel.

2. The death penalty is arbitrarily and discriminatorily applied in North Carolina;

   A. As to the defendant, since its imposition upon him was disproportionate when compared to other cases.

   B. As to defendant, since the jury was permitted to consider a verdict of guilty of second degree murder.

   C. In general, because the death penalty is so applied in North Carolina.

I consider the contentions in the above order.

II. **BACKGROUND:**

The defendant was, at the 9 June 1980 Session of the Superior Court, Mecklenburg County, convicted of assault with a deadly weapon with intent to kill inflicting serious injury, kidnapping, and first degree murder. He was sentenced to death in the murder case.

The events out of which the charges arose occurred 21 August 1979. The evidence at both the guilt or innocence and penalty phases of the trial is adequately summarized in *State v. McDougall,* 308 N.C. 1. Of that introduced at the guilt phase, Justice Martin wrote:

> "After voluntarily injecting cocaine, defendant gained entry into the home of Diane Parker and Vicki Dunno by cunning, guile and misrepresentation. Once in their home, he commenced a campaign of terror against the two young women, cutting, stabbing, and slashing them with a butcher-knife. There is strong evidence that defendant killed Diane Parker while attempting to rape her. . ."

Shortly after bills of indictment were returned on 4 September 1979, defendant retained as counsel Wallace Osborne, of the Mecklenburg bar, who had practiced law in Charlotte for a number of years. Because his practice at the time was not primarily in the field of criminal law, Osborne, with the consent of defendant, associated Michael Scofield in the defense.

Scofield was experienced in the defense of major criminal cases, including capital cases. He had served as an assistant U.S. Attorney, as Public Defender for Mecklenburg County, and as a private practitioner.

The defendant stipulated at the hearing that he does not

contend there is any evidence incompetency or error upon the part of Osborne or Scofield.

Osborne and Scofield thoroughly investigated and prepared for trial. They retained the services of a psychiatrist, Dr. Stephen S. Teich; a "juristic psychologist", Courtney Mullin; a "correctional psychologist, Dr. Brad Fisher; private investigators, and other experts. They vigorously pursued discovery and appropriate motions.

Both fully appreciated the strength of the State's evidence, and the difficulty of formulating a defense when defendant suffered from amnesia as to the events. They tried to enter into plea negotiations with the State, but did not succeed.

On 27 February 1980, the defendant was sent to Dorothea Dix Hospital for psychiatric examination and evaluation of his sanity. His counsel arranged for Dr. Teich and Ms. Mullin to treat him for amnesia while there.

Both Dr. Teich and Ms. Mullin had been associated with Jerome "Jerry" Paul, who practiced law in Durham, in the defense of criminal cases, and Dr. Teich had treated Paul as a physician. They took Paul to visit the defendant at Dix, and one, or both, urged him to retain Paul.

Paul had practiced law since his admission to the bar in 1968, and represented defendants in several well publicized criminal cases, including the trial of Joan Little for murder in 1975. At that trial, Judge Hamilton Hobgood, one of North Carolina's most experienced and respected trial judges, stated that ". . . Mr. Paul is a very good lawyer and a very intense lawyer. He fights very hard and intensely for his client", prior to sentencing him for contempt. *In re Paul,* 28 N.C. App. 610, 617.

Paul had for a long time suffered from severe migraine headaches. In 1977, after the illness and death of a son, he also experienced deep depression. In May of 1979, feeling he was no longer able to practice law, he moved to New York. While there he was under psychiatric treatment by Dr. Teich, and hospitalized for migraine on several occasions.

During this period, Paul neglected his professional duties, as a result of which grievances were lodged with the North Carolina State Bar, and disciplinary procedures instituted. These were still pending at the time of his representation of defendant. (See Section III, A-1, *infra.*).

After meetings with Scofield, the defendant and his family, Paul was, with the consent of Osborne and Scofield, retained about the end of May, 1980, and designated by defendant as lead counsel.

Paul's trial technique was to use a defense "team". In addition to the three lawyers, it included Dr. Teich, who had an active role in the trial; Ms. Mullin; a paralegal; and others. Specialized services of a pollster and professor of psychology, a hypnotist, a toxicologist, and even a person to advise witnesses how to dress were also employed.

The trial began 9 June 1980. After extensive voir dire examination, a jury consisting of six white and six blacks was impaneled.

On 18 July, the jury, by special verdict, found that defendant was not insane. On 21 July, it returned guilty verdicts.

The jury, at the sentencing phase, found as aggravating circumstances that the defendant had previously been convicted of a felony involving the use of violence to the person; that the murder was especially heinous, atrocious,

and cruel; and that the murder was part of a course of conduct which included the commission of another crime of violence against another person. As mitigating circumstances it found that the murder was committed while defendant was under the influence of mental or emotional disturbance; that defendant's capacity to appreciate the criminality of his conduct or his capacity to conform his conduct to the requirements of law was impaired; and other mitigating circumstances arising from the evidence. It recommended the death penalty.

Defendant was represented on appeal by his present counsel, Mr. Fuller. The North Carolina Supreme Court found no error, and determined that the sentence was not excessive or disproportionate to the penalty imposed in similar cases. *State v. McDougall, supra.* The U.S. Supreme Court denied *cert.*, ____ U.S. ____, 78 L.Ed.2d 173.

III. DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL:

A. Paul's License to Practice Law in North Carolina:

The evidence shows that at the time of defendant's trial two disciplinary actions were pending against Paul before the Disciplinary Commission of the North Carolina State Bar. On January 21, 1980, an order was issued in 79 DHC 13, suspending him from the practice of law for 2 years. On May 23, 1980, an order of suspension for one year was entered in 79 DHC 20.

However, due to motions and appeals the orders of suspension were not effective until April 2, 1981, as shown by the order of reinstatement, filed April 13, 1984.

The defendant argues that I should disregard this, and

find that the suspensions were actually effective at the time he was retained as defendant's counsel.

N.C.G.S. 84-23 vests in the Council of the North Carolina State Bar the control of the discipline, disbarment, and restoration of attorneys practicing in the State. N.C.G.S. 84-28 prescribes the procedure for disbarment. N.C.G.S. 84-28.1 establishes a disciplinary hearing commission, which is authorized to hold hearings as to disciplinary matters, and to enter orders necessary to carry out its duties. Under N.C.G.S. 84-28, as it existed at the time of the proceedings against Paul, an attorney disbarred by an order of the Disciplinary Hearing Commission had an absolute right to appeal to the appellate division of the General Court of Justice, and discipline was stayed pending determination of the appeal.

The record of the proceedings against Paul show that he took advantage of every procedure possible to defer a final decision as to his suspension from practice. The defendant argues that I should disregard the finding of the State Bar Council, and hold that Paul's license was in fact suspended before he accepted employment in this case, or that, at least, the suspension became effective during the trial.

To do so would be to disregard the entire statutory scheme governing the disicpline of members of the bar in North Carolina, which is beyond the powers of this Court.

The fact is, that at the time Paul represented defendant, his license to practice law in North Carolina had not been suspended by reason of any action of the Disciplinary Hearing Commission which was final under the law, and, as the testimony of Scofield and the later Order of Reinstatement show, the State Bar did not consider it to be final at that time.

I therefore find that Paul, at the time he represented the defendant, was duly licensed to practice law in North Carolina.

I conclude as a matter of law, that defendant's contention that he was denied effective assistance of counsel because Paul was not licensed to practice law is without merit.

B. **Paul's Mental and Physical Condition During Trial:**

I find from the evidence that Jerry Paul had suffered from severe migraines for a number of years. As a result of the illness and death of his son in 1977, he suffered from a deep mental depression, which exacerbated the migraines.

Dr. Teich treated Paul for depression during 1979, and another physician treated him for migraine. By the end of April, 1980, Dr. Teich was of the opinion that Paul was emotionally and intellectually capable of practicing law.

Anticipating that the stress of a long trial would result in migraines, Dr. Teich, who was with Paul during the entire trial, not only himself monitored his condition, but arranged for a Charlotte neurosurgeon to oversee it.

Paul did have attacks of migraines during the trial. The evidence shows that on four occasions in June, and five in July he received treatment for the condition at the emergency rooms of Charlotte hospitals, and medications, including narcotics, were administered to him under a doctor's supervision.

Because of the migraine, Paul on one occasion requested the judge to recess court, and the request was granted. On two occasions, he was unable to conduct examination of witnesses as he had planned to do, and Sco-

field did so. At times, because of the attacks, he laid on a couch or the floor in Scofield's office. Although there is some testimony that at unspecified times he appeared to doze in court, he never appeared to his co-counsel, or to the presiding judge, to be under the influence of narcotics.

Based on this evidence, defendant contends that Paul's condition rendered his assistance ineffective.

The Supreme Court of North Carolina, in *State v. Richards,* 294 N.C. 474 (1978), considered an effectiveness of counsel claim based upon the physical disability of counsel, and said, at p. 498:

> "We think . . . that the question does not turn on the physical incapacity of counsel as such, since this may or may not deprive a defendant of effective representation. Rather, it is necessary to examine counsel's specific acts or omissions which the defendant alleges constitute a denial of effective assistance. The reviewing court must approach such questions *ad hoc*, and in each case view the circumstances as a whole."

The United States Supreme Court has recently considered the question of constructive denial of counsel in *United States v. Cronic,* ____ U.S. ____, 80 L.Ed.2d 657 (1985). It said that under certain circumstances, such as those shown in *Davis v. Alaska,* 414 U.S. 308 (1974), and *Powell v. Alabama,* 287 U.S. 45 (1932), the likelihood that even a fully competent lawyer could provide effective assistance is so small that prejudice would be presumed. The Court made it plain, however, in footnotes 26 and 30 to that opinion, that absent such circumstances the defendant must show that specific errors of counsel undermined the reliability of the finding of guilt.

The evidence before me does not show, and defendant has not alleged, any specific error resulting from Paul's mental or physical condition. To the contrary, I find from the evidence that Paul actively and vigorously participated in the vast majority of all aspects of the trial. He conducted lengthy voir dire examination of jurors; examined and cross-examined numerous witnesses; lodged proper objections; participated in planning sessions with co-counsel; conferred with defendant; argued motions; made jury arguments; and otherwise discharged the duties of a defense counsel.

Whenever he was unable to be in court, two competent lawyers, Osborne and Scofield, were at the defense table. When he was unable to examine a witness, Scofield had sufficient opportunity to confer with the witness and effectively conduct the examination.

In argument, defendant stresses Paul's visits to hospital emergency rooms, and the nature of the medicines administered. Of the nine visits, eight were at night, one in the morning before court hours. On the day after three of the visits, the minutes show that the court was in recess. During the afternoon of June 26, 1980, on the evening of which one of the visits took place, Paul conducted lengthy examinations of witnesses upon *voir dire.*

The evidence falls far short of demonstrating that the defendant was constructively denied the assistance of counsel by reason of Paul's mental or physical condition. I find that to whatever extent it may have prevented him from participating in trial activities at specific times, two lawyers whose competence has not been attacked by defendant, fully discharged the adversarial role mandated by the Sixth Amendment during his absence.

The standard by which effective assistance of counsel is to be judged, and the guidelines to determine whether the

standard has been met, were laid down by the Supreme Court by the United States in *Strickland v. Washington,* ____ U.S. ____, 80 L.Ed.2d 674 (1985), which was decided the same day as *Cronic, supra,* and by the Supreme Court of North Carolina in *State v. Braswell,* 312 N.C. 533 (1985).

The standard is whether counsel's conduct was so deficient as to undermine the proper functioning of the adversarial system so that the trial cannot be relied upon as having produced a just result.

To establish ineffectiveness, except in cases of constructive or actual denial of counsel, the defendant must first identify the acts or omissions which are alleged not to have been the result of reasonable professional judgment. The Court must then determine whether, in light of all the circumstances, they were outside the "wide range" of competent professional assistance. Even if the Court does so determine, the defendant must then show prejudice.

The defendant here has failed to identify any act or omission by Paul which resulted from his physical or mental condition during the trial which is alleged not to have been the result of reasonable professional judgment. The only specific act he has pointed out is Paul's final argument during the sentencing phase of the trial, and there is no evidence it resulted from Paul's physical or mental condition. That contention is considered separately, *infra.*

I find that neither Paul's mental nor physical condition during the trial caused, or resulted in, any act or omission on the part of defendant's counsel which was not the result of the exercise of reasonable professional judgment, and therefore conclude as a matter of law that this contention is without merit.

C. **Constructive Denial of Counsel Arising from Paul's Conflicts of Interest:**

Defendant in his brief for the first time alleged that Paul had undisclosed conflicts of interest which resulted in a constructive denial of counsel. They are alleged to be his personal problems, his health, the pendency of disciplinary proceedings, his interest in earning fees, and in reclaiming his reputation. He argues that these considerations affected Paul's independent judgment on his behalf.

In the first place, it is difficult to fit defendant's specific allegations into what is generally considered a "conflict of interest." The cases briefed by defendant do not assist in resolving the difficulty, as they all embrace factual situations of the conventional types of conflict.

However, I find in the commentary to Sec. 3.5, *ABA Standards Relating to the Defense Function,* language to the effect that there are "subtle" types of conflict which a defense counsel must avoid, such as an opportunity to further his own personal or general social issues, or take a case because of the great publicty he expects it to attract. Although Sec. 1.1(f) of the Standards cautions that they are not intended as criteria for judicial evaluation of the effectiveness of counsel, I assume, for purposes of decision as to this contention, that such personal considerations may, under certain circumstances, constitute a possible conflict of interest.

The evidence before me does not support defendant's allegation that these conflicts, if such they be, were undisclosed. It is clear from the testimony of Mrs. Frech, defendant's mother, and of Mrs. Walls, his sister, that they had ample reason to know, from incidents during Paul's visit to them in Georgia before he was retained, that he was not well. As a result, Mrs. Frech called Scofield and inquired whether Paul was "on drugs." Scofield, after

inquiring of Dr. Teich, advised her that Paul suffered from migraines and was on medication as a result.

Scofield, having heard about the pending disciplinary actions, made inquiry of the State Bar, was told that Paul was licensed to practice law in North Carolina, and so advised Mrs. Frech.

As to Paul's concern with earning a fee, and in enhancing his reputation, if such considerations constitute conflicts of intereset, perhaps a majority of lawyers could never ethically represent any client.

The Supreme Court of the United States, in *Cuyler v. Sullivan,* 446 U.S. 335, 64 L.Ed.2d 333 (1980), held that a possibility of a conflict of interest is insufficient to overturn a criminal conviction. "In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." Only then will prejudice be presumed. *Strickland, supra.*

Those circumstances cited by defendant constitute, at best, only possible conflicts. The defendant has not shown a single instance in which the conflict became actual, and adversely affected Paul's performance. Prejudice cannot therefore be presumed.

The contention that pending disciplinary actions constitutes a conflict of interest was rejected by the Fourth Circuit Court of Appeals in *Roach v. Martin,* 757 F.2d 1463 (1985). The Court held that the allegation must be supported by evidence of impropriety upon the part of counsel, and rejected a *per se* rule of ineffectiveness in such circumstances.

I find that the defendant has failed to show any actual conflict of interest which resulted in any conduct upon the part of Paul which denied him effective assistance of

counsel, and conclude that this contention is without merit as a matter of law.

D. **Supervisory Power of the Court:**

As a "catch all", defendant contends that this Court, under its "supervisory powers" should order a new trial for him because of Paul's "Complete disregard for the rights of his client and lack of respect for the system of justice in this State", which rendered his trial a "travesty".

N.C.G.S. 15A-1415 sets out the grounds for appropriate relief upon a motion such as this. N.C.G.S. 15A-1420(c)(6) provides that a defendant must show the existence of the asserted ground for relief, and that relief must be denied unless prejudice is shown.

There is no doubt that the evidence at this hearing reveals that Jerry Paul during the period of his representation of defendant violated a number of the canons of the Code of Professional Responsibility of the North Carolina State Bar. By "puffing his wares" to defendant and his mother, he violated DR2-101(A), and DR2-103(A)(1) and (C), and by his statements to the media, DR7-107. Accoring to the testimony of the defendant, Paul also commited the felony of furnishing a controlled substance to an inmate of a jail, in violation of N.C.G.S. 14-258.1, and at least suggested perjury.

This Court is not vested with the authority to grant relief to the defendant solely because one of his counsel acted unethically, or even criminally. He must show, by the greater weight of the evidence, that such acts prejudiced his defense.

The evidence does not show such prejudice. What it does show is that the defendant had the assistance not only

of three lawyers, but of a number of experts in other forensic fields. The whole record demonstrates that there was a well defined, and pursued, theory of defense – insanity – which in view of the evidence as to circumstances of the crimes and defendant's apprehension thereafter, was the only reasonable one available. That it failed does not demonstrate that its pursuit was outside the range of effective representation.

The defendant argues in his brief that Paul produced, "conflict between co-counsel, turmoil in the relationship with client, and chaos among potential witnesses."

I find from the evidence that while there were serious disagreements between Paul, Osborne, and Scofield during the lengthy proceedings, arising from differing personalities, concepts of ethical behavior, and theories of defense, the three were able to communicate satisfactorily with each other, with the defendant, and with his family.

As for Paul's relation with the defendant, I find that the argument that it was "turmoil" is not supported by the testimony of the defendant. He was at the time preoccupied with the attempt to recovery his memory, and had a great deal of confidence in Dr. Teich. He frankly stated on the stand that he did not know what effect any of Paul's actions had on his trial.

The argument that Paul's conduct created "chaos" among witnesses is apparently based on the testimony of Ms. Mullin, the "juristic psychologist", and Dr. Fisher, the "correctional psychologist".

Ms. Mullin testified that, "nobody helped her to prepare to testify"; that, "the team had fallen apart"; and that her testimony was not coherent because of objections. She did not cite any specific instance in support of her conclusion.

Ms. Mullin, in an affidavit filed in the case, represented herself as a specialist in the area of jury research, juror selection, and voir dire procedures in death penalty cases; as a lecturer on those subjects before meetings of lawyers, and law students; as having been associated as advisor, coordinator, or researcher in over sixty criminal and civil cases; and as having testified as an expert in the courts of seven different jurisdictions.

She testified during the penalty stage as to her treatment of defendants' amnesia. She was not present during much of the guilt phase of the case, but returned to testify at the sentencing phase.

I find that the transcript of her testimony does not show that she was not prepared to testify. It is true that she was frequently interrupted by objections from the State, which she, as an experienced witness had no doubt encountered before. Despite this, she related to the jury in detail, at both the guilt and penalty stages, her treatment of defendant and his statements to her.

Ms. Mullin's testimony at the hearing on this motion conveyed the impression that she felt that her expert talents had not been properly utilized throughout the trial. The reason for this was revealed by Mrs. Frech, defendant's mother. She refused to pay Ms. Mullin's fee after jury selection was completed.

Dr. Fisher was first retained by Scofield and Osborne, to administer psychological tests to the defendant. He testified at the hearing that when he came to Charlotte at the trial, he was not prepared for his testimony by Paul, but did not cite any particulars.

At the guilt phase, Dr. Fisher testified at length about the tests he had administered to the defendant and gave his

conclusions based thereon. The transcript gives no indication that he was not well prepared to testify.

As with Ms. Mullin, his testimony at the hearing gave an impression that he felt he should have been accorded a more substantial role as a member of the defense "team", and suffered from a bruised ego.

After weighing and considering all of the relevant evidence, I find that the defendant has not shown by the greater weight of the evidence that Paul produced "chaos among essential witnesses".

As was pointed out by Justice O'Connor in *Strickland, supra,* the purpose of the constitutonal guarantee of effective assistance of counsel is not to improve the quality of legal representation, but to ensure that defendants receive a fair trial. It is reasonable to also infer that its purpose is not to serve as a vehicle to police the ethics of a member of the legal profession.

I find that the defendant has not shown a reasonable probability that, but for Paul's unethical, or criminal conduct, the result of his trial would have been different, or that he was prejudiced by such conduct.

Theefore, as a matter of law, I conclude that this Court has no authority to grant any relief in the exercise of its supervisory powers, or otherwise. This contention is without merit.

E. **Paul's Closing Argument at the Sentencing Phase of Trial:**

The only specific instance of Paul's performance which the defendant designates as deficient is his closing argument at the sentencing phase of the trial.

The speech was polemical – a direct, frontal attack against the death penalty. In strong language, Paul labelled it an instrument of a ruling class used against minorities, such as blacks, and to which he, as a "freedom fighter" and disciple of Martin Luther King, was vehemently opposed. It abounded with references to his personal beliefs and disbeliefs, political, social and religious, in defiance of DR7-106C(4) of the *Code of Professional Responsibility*.

The evidence reveals differing reactions to the speech. Scofield characterized it as "stupid". Allen A. Bailey, a highly competent attorney, in an affidavit filed by defendant, concluded that it was without a theme, unorganized, disjointed, without direction, offensive, "outrageous", and did not meet minimum standards of competence.

Judge Forest Ferrell, the experienced trial judge who presided at defendant's trial, found it, "as good, if not better" than other death penalty arguments he had heard. He did not find it offensive to the jury, but rather that it "called into play the conscience of the jury". He concluded his affidavit by saying:

> "It is my professional opinion, as a trial-judge who has presided over many serious felony trials and nine capital cases, that Jerry Paul's argument was appropriate, effective and well within the range of competence and expertise expected of attorneys in civil cases."

In *Rorrer v. Cooke,* 313 N.C. 338 (1985), a legal malpractice case, the Supreme Court of North Carolina said:

> "The mere fact that one attorney-witness testifies that he would have acted contrarily to, or differently from the action taken by the defendant

> is not sufficient to establish a prima facie case of defendant's negligence. The law is not an exact science but, is, rather, a profession which involves the exercise of individual judgment. Differences in opinion are consistent with the exercise of due care."

This statement is consistent with the guidelines which Justice O'Connor delineated for judicial consideration of counsel performance in *Strickland, supra.*

1. Scrutiny must be highly deferential.

2. There are no detailed rules which take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions as to how best to represent a defendant.

3. Counsel's conduct must be judged on the facts of a particular case, weighed as of the time of the conduct.

I find as a fact that at the time Paul chose to make the argument, the circumstances were these:

The defendant had been found guilty of a particularly brutal first degree murder, an equally brutal assault, and kidnapping. The State had presented evidence at the sentencing hearing that the defendant had been previously convicted of the forcible rape of a young woman, who testified at the sentencing hearing. The defendant's explanation of the crimes was voluntary ingestion of cocaine, and traumatic childhood experiences. The testimony of Dr. Teich suggested that he may, as a child, have killed his grandfather.

Six of the twelve jurors were black. Paul knew that to achieve the best possible result for defendant, a recommendation of life imprisonment, he had to convince only one juror to maintain that position. N.C.G.S. 15A-2000

(b). Scofield had told the jurors to agree on a death sentence, or there would not be one.

The evidence is undisputed that Paul intentionally framed his argument to influence black members of the panel, worked hard on it, and discussed it with Dr. Teich.

It is in the light of these circumstances that defendant's claim of ineffectiveness must be weighed.

To establish deficient counsel performance under *Strickland, supra,* the defendant must first show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment, that is, that he did not render "reasonably effective assistance", considering all the circumstances. The Court emphasized that the fact finder must indulge a "strong presumption" that counsel's conduct does fall within the wide range of reasonable assistance, "that is, the defendant must overcome the presumption that under the circumstances the challenged action 'might be considered sound trial strategy' ".

Weighing the content of Paul's argument in the light of the *Strickland* guidelines, I cannot conclude that, under the circumstances facing him, it was conduct which was "outside the wide range of professionally competent assistance" as required by *Strickland, supra.* If, as he obviously planned and hoped, one juror had refused to join in a recommendation of death, the only possible satisfactory result would have been attained. That he did not succeed does not demonstrate that the argument constituted ineffectiveness, and the fact that the jury deliberated for seven hours before returning a verdict tends to belie the opinion of Scofield that Paul's argument was "stupid", and Bailey's that it was offensive to the jurors.

Further under *Strickland, supra,* the defendant must show that there is a reasonable probability that, but for the deficient performance, the result would have been different – a probability sufficient to undermine confidence in the result.

"When a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death".

Even if Paul's argument were deemed to be ineffective assistance, defendant has made no showing of prejudice. The totality of the evidence before the jury at the sentencing stage amply supported its recommendation of the death penalty. The Supreme Court of North Carolina, pursuant to its statutory duty to consider proportionality, concluded that:

> "The transcript and record do not support the theory that this murder was the product of defendant's unfortunate childhood or a deficient personality exacerbated by the involuntary injection of cocaine."; *State v. McDougall, supra,* p. 37.

I find that Paul's closing argument at the sentencing phase of the case was, under the circumstances then existing, trial strategy which was within the range of reasonably effective assistance of counsel. I further find that the defendant has failed to show that there is a reasonable probability that, but for the argument, the finding of the jury would have been different.

I conclude, as a matter of law, that this contention is without merit.

IV. ARBITRARY AND DISCRIMINATORY APPLICATION OF THE DEATH PENALTY:

A. Proportionality of the Imposition of the Death

The North Carolina Supreme Court, in *State v. McDougall, supra,* pursuant to N.C.G.S. 15A-2000(e)(2), carefully considered the proportionality of the sentence of death imposed upon the defendant, under the procedure adopted in *State v. Williams,* 308 N.C. 47, and declined to exercise its discretion to set aside the sentence of death as disproportionate.

This contention having been determined against the defendant on direct appeal, it may not be re-litigated upon a motion for appropriate relief. N.C.G.S. 15A-1419(a)(2).

B. Submission of Second Degree Murder to Jury:

The defendant argues that the submission to the jury of a verdict of guilty of second degree murder as a lesser included offense contravened the holding of the Supreme Court of the United States in *Hopper v. Evans,* 456 U.S. 605, 72 L.Ed. 367, which held that due process requires that a lesser included instruction be given only in cases in which the evidence would have supported such a verdict.

The record in defendant's case shows that his case was submitted to the jury on both the theory of premeditation and deliberation, and felony murder. The jury found the defendant guilty of felony first degree murder, but not of premeditated first degree murder.

A possible verdict of second degree murder was submitted to the jury as an alternative to a finding of guilty of first degree under premeditation and deliberation, which

was to be answered only if the jury failed to find the defendant guilty of first degree murder upon either theory.

In this case, the evidence as to the ingestion of drugs by defendant would have supported a verdict of guilty of second degree murder, so that its submission was proper under *Hopper v. Evans, supra.*

Finally, as to this contention the defendant was in a position to adequately raise this issue upon appeal, but did not do so, N.C.G.S. 15A-1419(a)(3).

Therefore, I conclude that this contention is without merit, as a matter of law.

C. **Arbitrary and Discriminatory Application of the Death Penalty in North Carolina in General:**

This contention is based upon testimony given before another Superior Court by Prof. Samuel Gross, Associate Professor of Law, Stanford Univeristy.

Prof. Gross made a statistical study of homicides committed in North Carolina between 1 June 1977, and 31 December 1980, and testified as to his conclusions based thereon.

The State's evidence consisted of the testimony of Dr. Elliot Cramer, an expert in applied statistics, and others.

Based upon the evidence, I find the following facts:

1. Gross made an analysis of all homicides committed in North Carolina from 1 June 1977 through 31 December 1980.

2. He used as his database reports submitted by local law enforcement officials to the FBI, through the North Carolina Police Information Network. These included all homicides, classified as voluntary manslaughter, second

degree murder, and first degree murder. The reports show the race of the "suspect" and of the victim. They are never corrected or updated.

3. Using information obtained from "Death Row USA", Gross used as controls whether the homicide was committed by a stranger to the victim, whether another felony was involved in the homicide, whether there were multiple victims, the sex of the victim, the means of killing and the geographic location of the homicide.

4. Gross did not control for statutory aggravating or mitigating circumstances.

5. Gross utilized only trial court results of the cases in his database, and did not adjust for reversals of the death sentence on appeal as to 13 of the 27 defendants included in his study.

6. Gross' study was based upon numerous assumptions which he admitted are impossible to verify.

7. Using a statistical method known as "logistic regression analysis", Gross reached results upon which he based an opinion that in North Carolina the death penalty is more likely to be imposed when the victim is white than when the victim is black, and that there is a pattern of racial discrimination in the imposition of the death penalty in North Carolina.

8. The statistical method used by Gross is unreliable because of the small number of cases in the same categories, the inclusion in the database of other than first degree murders, the use of only trial court results, the lack of essential controls for statutory aggravating and mitigating factors, and because of the difficulty or impossibility of verifying logistic regression analysis based on his data.

9. Gross' study does not support his conclusion that there is a pattern of racial discrimination in the imposition of the death penalty in North Carolina.

In *McKlesky v. Kemp,* 753 F.2d 877 (11th Cir. 1985) the Court, in assessing the results of a study of the imposition of the death penalty in Georgia by Prof. Baldus which attempted to control for all the factors which are involved in a capital crime system (and which was referred to with approval by Gross), said: "Statistical analysis is useful only to show facts. They are useful to show disparate impact, less useful to show the causes of that impact, and even less useful to show intent and motivation."

The Court held that a statistical finding of disparate impact alone is not sufficient to invalidate a capital sentencing scheme, unless it is such as to compel the conclusion that race is intentionally used as a factor in sentencing.

Gross' study falls far short of this criteria. It is therefore concluded, as a matter of law, that the North Carolina death penalty statute, N.C.G.S. 15A-2000, is not applied in an arbitrary and discriminatory manner in contravention of any provisions of the Constitution of the United States, or the Constitution of North Carolina. *Gregg v. Georgia,* 428 U.S. 153 (1976), *Furman v. Georgia,* 408 U.S. 238 (1972).

I find that the death penalty in North Carolina is not imposed arbitrarily or discriminatorily in general, and conclude as a matter of law that N.C.G.S. 15A-2000, as applied, does not violate any provision of the Constitution of the United States, or the Constitution of North Carolina.

I conclude as a matter of law that this contention is without merit.

V. CONCLUSION:

Because this is a capital case, I have weighed and considered all of the evidence before me with extreme care. I have considered carefully the briefs submitted, and supplemented them with my own research.

As the defendant stated in his brief, this proceeding was principally a trial of Jerome "Jerry" Paul. Since Paul was not presented as a witness by either party – and I can well appreciate the decision of both not to call him as a witness, in view of his erratic nature as revealed by the evidence before me. The failure did result, however, in a production of Hamlet without the Prince of Denmark.

If the issue before me were the ethical and moral behavior of Jerry Paul, I would under the evidence find him guilty as charged by defendant in those respects.

That is not the issue. The question is whether Paul's transgressions resulted in the defendant's being denied his constitutional right to effective assistance of counsel. I have determined that they did not. Other aspects of his behavior must be left to another tribunal.

Upon the whole record, I find that the defendant had a fair trial. He was represented by two lawyers, Scofield and Osborne, whose competency he does not question. Long before Paul intruded himself into the case, they had made an exhaustive investigation of the evidence available to them, and thoroughly prepared for trial. Using the financial resources which were happily available to them, they enlisted the support of experts in other disciplines to assist in the defense. Exercising their best professional judgment, they weighed the evidence available to the State, and decided to attempt to negotiate a plea with the State, but could not do so. They then, again exercising their best professional judgment, decided that the trial strategy most

likely to achieve a sentence of life was to concentrate their efforts on the sentencing phase of the trial.

Whether the decision of defendant and his family to retain Paul was a wise decision is moot – they did, and designated him as lead counsel. His assessment of the case differed from that of his co-counsel. He concentrated his efforts on the insanity defense, a decision which the evidence shows was approved by defendant and his mother.

Whether adherence to the plan of original counsel would have resulted in a different sentence is an unanswerable question. Lawyers must deal with evidence as it exists – although the evidence shows that Paul attempted to concoct some. The details of the sordid crimes were irrefutable. Defendant's prior conviction of a crime of violence could not be expunged, although Paul, by filing a post conviction proceeding in Georgia, hoped to do so. The evidence as to defendant's mental condition and childhood experiences could not be changed.

The only thing of which I am convinced is that Paul's theory as to the strategy best in the interests of the defendant was within the range of reasonably effective assistance of counsel mandated by the Sixth Amendment.

The conduct of the trial itself as reflected in the record, equaled, and perhaps exceeded that of capital cases over which I have presided during some eighteen years on the Superior Court bench.

Paul, Scofield, and Osborne to the extend he participated in trial proceedings, battled the State at every step. They insured the proper functioning of the adversarial process.

In addition, because of financial resources available to him, the defendant had the benefit of a host of support

talent from disciplines other than the law. It is difficult to imagine any avenue of defense which was not utilized.

I find, as an ultimate fact, that the death penalty imposed upon the defendant did not result, in the language of Justice O'Connor in *Strickland, supra,* "from a breakdown in the adversary process that renders the result unreliable."

VI. ORDER

IT IS THEREFORE ORDERED:

1. The motion for appropriate relief is denied.

2. The Attorney General of North Carolina shall take such action with respect to the Stay of Execution issued in this case by the Supreme Court of North Carolina 26 May 1983 as he deems necessary.

3. The Clerk shall send a copy of the Memorandum Opinion and Order to all counsel of record.

This 9th day of August, 1985.

/s/ Frank W. Snepp
Frank W. Snepp
Senior Resident Superior Court Judge

APPENDIX B

No. 86A81 TWENTY-SIXTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

* *

STATE OF NORTH CAROLINA	)	
v.	)	*From Mecklenburg*
MICHAEL VAN McDOUGALL	)	

* *

ORDER

Upon consideration of the petition filed by Defendant in this matter for a writ of certiorari to review the Superior Court, Mecklenburg County, the following order was entered and is hereby certified to the Superior Court of that County:

> "Denied by order of the Court in conference, this the 7th day of April 1986.
>
> s/ Billings, J.
> For the Court"

Accordingly, the cause is remanded to the Superior Court, Mecklenburg County. The District Attorney shall promptly calendar a hearing, as required by G.S. 15-194, to fix a new date for the execution of the original sentence.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 15th day of April 1986.

/s/ Peggy N. Byrd
J. GREGORY WALLACE
Clerk of the Supreme Court

Copy to:
North Carolina Court of Appeals
Mr. James C. Fuller, Jr., Attorney at Law, For the Defendant
Mr. Richard Rosen, Attorney at Law, For the Defendant
Ms. Joan Byers, Special Deputy Attorney General, For the State
Mr. Barry S. McNeill, Assistant Attorney General, For the State
Mr. Robert M. Blackburn, Clerk of Superior Court
Mr. Peter Gilchrist, District Attorney
Mr. Ralph A. White, Appellate Court Reporter

APPENDIX C

EXCERPTS FROM TRANSCRIPTS OF PROCEEDINGS

MR. PAUL'S ARGUMENT TO THE JURY:

Ladies and Gentlemen of the Jury, it comes my turn now to talk to you and basically talk to you about the death penalty. The death penalty is something that I've fought against all of my life, and that I've dedicated my career to fighting.

MR. CAUDILL: OBJECTION.

THE COURT: SUSTAINED.

MR. PAUL: When you talk about cold-blooded killing, the most cold-blooded act of a society, the most premeditated act of a society, the most deliberated act of a society, is the death penalty. You think about that. The State asks you to kill a person after thought, after deliberation, after premeditation, and that they want the death penalty. The State asks you to go back in that jury room and take a pen similar to this one and write on a piece of paper something that no human on earth has the right to do. They ask you to write that another human being should be killed. Nobody has that right. Lawyers like myself have stood before juries for centuries. In ancient England they used to give you the death penalty for stealing a loaf of bread. They used to give you the death penalty because you would refuse to serve in the king's navy. They used to give you the death penalty because your children were hungry and you stole some clothing for them. The law, in all its majesty. The law, which is the expression of the ruling class. And in this case, the law is the expression of the ruling class, and the jury's refused to convict him. The jury's refused to carry out the order of the ruling class.

This man represents the ruling class. If there's a spoiled brat, as he talks about in this courtroom, it's him. Only a spoiled brat would get up in anger and ask you to kill. We fought a world war, World War Two, against a country that believed in killing, that had a death penalty, and after that war, there were trials. There were trials at Nuremberg, and the world decided that theere is no such thing as simply following orders and escaping guilt. The world decided that there is mass guilt, and when one of you takes that pen and takes a man's life, you all share in that guilt, and that guilt will follow you for the rest of your life. There will be no escape from it. You will take it to your grave that you participated in an act that killed another human being, and nobody has that right. Not me. Under no circumstances could I get up and ask you or –

MR. CAUDILL: OBJECTION.

THE COURT: OVERRULED.

MR.PAUL: To kill another human being, no matter what they had done, because I know the results of killing. I know that a society that kills people is a society that breeds violence. For many years, we fought the death penalty becasue the death penalty was reserved solely for –

MR. CAUDILL: OBJECTION.

THE COURT: SUSTAINED.

MR. PAUL: – the poor and for black people.

MR. CAUDILL: OBJECTION.

MR. PAUL: and we know –

THE COURT: Just a minute. OBJECTION SUSTAINED.

MR. PAUL: And we know if they kill this white boy, we know who's next.

THE COURT: OBJECTION.

MR. PAUL: And that's why –

THE COURT: Just a minute sir. OVERRULED. Go ahead.

MR. PAUL: And that's why we have to fight it, be cause we know that the State operates with a plan. We know that that plan will require the civil rights lawyers like myself to come on down the line and fight in battles.

MR. CAUDILL: OBJECTION.

MR. PAUL: We don't have the same situation.

THE COURT: OVERRULED.

MR. PAUL: The State talks to you about the money that was spent in this case. You know who spent the most money in this case? The State did. We, the defense, didn't spend nearly what the State spent, and that's been proven in case after case. The State says that you should not have mercy. What type of person would get up and tell you, "Don't have any mercy"? I know that I only speak to a few of you. I know that in the hearts of many of you is vengeance and I know in the hearts of many of you is hatred, and I know that I have done things in this state that you disagree with, but I know now that the battles that I fought ten years ago are now in practice, and I've had people come up to me and say, "Jerry, you were right all along."

MR. CAUDILL: OBJECTION.

MR. PAUL: And I'm right about this.

THE COURT: Sir, may I rule before you finish?

MR. PAUL: Excuse me.

THE COURT: OVERRULED. Go ahead.

MR. PAUL: And I'm right about this fight. I know that fifty yers from now history will look back and they'll say, "What type of barbaric act was it that killed other people?" You see, I grew up following Dr. King. I was a student in his demonstrations, went to jail with Dr. King.

MR. CAUDILL: OBJECTION.

MR. PAUL: And I learned one—

THE COURT: Just a minute.

MR. PAUL: Excuse me.

THE COURT: OBJECTION SUSTAINED.

MR. PAUL: I learned one thing from those struggles. They taught me that no matter what the circumstances, non-violence must always oppose violence, no matter what the trouble, because if non-violence does not oppose violence, then democracy dies. We have no equal justice. The State doesn't want equal justice. The State wants to create a situation where they can go back to the way it used to be, and I know that, and I know that in this situation and in every situation, that non-violence must oppose violence because unless non-violence asserts its superiority no matter what the situation, then violence will carry the day. I know that it's the same type of people who want the death penalty who lead us into wars. I know that in every country in the history of this world where there's been a revolution, and you can name them – Nicaragua, Spain – one of the first acts that that country has done is to get rid of the death penalty because the death penalty is the tool of the Facists. The death penalty is the tool of the totalitarians. And that is a battleground that we have to fight. Had we chosen to fight Hitler in Spain, when the Facists were fighting in Spain, there would never have been World War Two, and if you don't fight Facists when they first rear their ugly head, and if you don't fight them when they want the death penalty – why do you think that Facists want the death penalty? It's because they can kill the minorities.

MR. CAUDILL: OBJECTION.

THE COURT: OVERRULED.

MR. PAUL: They can kill those who resist them. And without a death penalty, the State is without a weapon to silence those who would speak out against it, and people will tell you that I'm for social change, I'm for a different system, and that is true, and I have always been for a dif-

ferent system. I've always been for one where there's equal—

MR. CAUDILL: OBJECTION to what he's for.

THE COURT: OVERRULED.

MR. PAUL: I've always been for a system where non-violence is superior to violence and where non-violence asserts itself and proves its superiority.

You know, they talk about Mike McDougall. Remember the famous case that Clarence Darrow argued of Leopold and Leap, where two young men for the thrill of it killed, and Darrow made a plea for days — and I'm not Darrow, don't claim to be. I'm not that capable. I wish I was. For their life, because he knew—

MR. CAUDILL: OBJECTION.

THE COURT: OVERRULED.

MR. PAUL: He knew that to take their life would lessen this nation. There is not a trial lawyer, there is not a person throughout this history that we honor who wasn't against the death penalty. Why do you think that's so? It's based on experience and knowledge, and it's based on knowing the horrors of what the death penalty does to a nation and does to a people.

They didn't need the death penalty so much in the twenties and thirties because they had lynching — and we all know who they lynched — and when we fought the battle against lynching, then they came in with the death penalty, and the same people they lynched they gave the death penalty to, and that's the plan and I know it.

MR. CAUDILL: OBJECTION.

MR. PAUL: I want to read to you—

THE COURT: Just a minute. OVERRULED.

MR. PAUL: They called Clarence Darrow an attorney for the damned because he fought these cases. Often he lost, but he predicted the future for us. Let me read to you what Clarence Darrow had to say about the death penalty.

MR. CAUDILL: OBJECTION.

THE COURT: OVERRULED.

MR. PAUL: As one paragraph has as a beginning – may I get some water, Judge?

THE COURT: Yes.

MR. PAUL: I apologize for my broken voice because I'm very sad about this. This has touched me in a sad way not only for myself, for Mike McDougall, for all of us, because I know we all stand in danger, and I've seen death. I've seen death up close. As Dr. Teich told you from the stand, I had a son who died of leukemia, and I learned something very valuable from that experience. I learned tht as long as there's life, something good can come, no matter how horrible the situation, and I went through three years of that, and I know that right up until the last, that good things came, no matter how hard it was on everybody else, and I know that to kill somebody takes away that good, and if you believe – and some people do believe – that there is a God, that there is redemption, then that last moment or whatever moments or whatever time period in life, some good can come from that. That you have no right to deny another person of every ounce of life they can get because good can come from it. Many times they wanted to pull the plug on my son and kill him because they said there was no hope, and I said no, and we learned that that was a good decision because good comes from it. Love comes from it. I've seen love come from the most cruel people you've ever seen. It is possible. You don't deny that. If you're truly cynical, and the criticism of people in this country is that they're too cynical, that they don't believe that good can come, but good can come and good things can happen, if you let them. People go in the direction you push them. If you kick a man when he's down, he'll continue to go down. If you give them some hope, if you push them up, encourage them, they'll go up.

Now, I want to read to you what Mr. Darrow had to say. "I have this stand moved up so I can get next to the audience. I hope I'll not be obliged to spend too much time on my friend's address. I don't think I shall need to. First, I deny his statement that every man's heart tells him it is wrong to kill. I think every man's heart desires killing. Personally, I have never killed anybody that I know of, but I have had a great deal of satisfaction now and then reading the obituary notices, and I used to delight with the rest of my 100 percent patriotic friends when I saw them or fifteen thousand Germans being killed in a day. Everybody loves killing. Some of them think it is too messy for them. Every human being who believes in capital punishment loves killing, and the only reason they believe in capital punishment is because they get a kick out of it. Nobody kills anyone for love unless they get over it temporarily or otherwise, but they kill the one they hate, and before you can get a trial to hang someone or to electrocute them, you must first hate him, and then get satisfaction over his death. There is no emotion in any human being that is not in every single human being. The degree is different – that's all – and the degree is not always different in different people. It depends likewise on circumstances, on time, and on place. I shall not follow my friend into a library of statistics. Statistics are a pleasant indoor sport, not so good as crossword puzzles. They prove nothing to any sensible person who is familiar with statistics. I might just observe in passing that in all of the states where mortality by homicide is great, they have capital punishment, and they've always had it. A logical man, when he found out that the death rate increased under capital punishment, would suggest some other way of dealing with it. I undertook to say – and you can look them up for yourselves for I haven't had time to bother with it – I will guarantee to take any set of statistics and take a little time

with it and prove they mean exactly the opposite of what is claimed, but I will undertake to say that you can show by statistics that states in which there was no capital punishment must have a very similar smaller percentage of homi cide." In other words, he's saying in states where there's no—

MR. CAUDILL: OBJECTION.

THE COURT: SUSTAINED.

MR. PAUL: "I know that is true. That doesn't prove anything because as a rule, there are states with less diverse population, without many large cities, such as — without as much mixture of all sorts of elements which go to add to that great gaiety of homicide as part of that. There is no sort of question but what those states of the United States where there is no capital punishment have a lower—"

MR. CAUDILL: OBJECTION.

THE COURT: SUSTAINED.

MR. PAUL: "But that doesn't prove the question. It's a question that cannot be proven."

MR. CAUDILL: OBJECTION.

THE COURT: Approach the bench.

(There was a sidebar conference.)

MR. PAUL: "The death rate recently in the United States and all over the world has increased. Why? The same thing has happend, and has happened in every country in the world since time began. A great war always increases the death rate. We teach people to kill, and the State is the one that teaches them. If the State wishes that all citizens respect human life, then the State should stop killing. It can be done in no other way, and it will perhaps not be fully done that way. There are infinite reasons for killing. There are infinite circumstances under which there are more or less deaths. It never did depend and can never depend upon the severity of the punishment."

And so he goes on and on to argue against capital punishment. It's tough to say what is in a person's mind. I know that people do not act out of free will. That it's circumstances that bring them to a particular point. I know that out of free will, that Mike McDougall didn't go next door. That circumstance took him there. Whether or not he had the choice, whether or not he could have done different, depends upon different people at different times and different circumstances. Whether or not the D.A.'s theory is correct, the theory is born and bred in hate.

If you want to stop hate, then you must do your part to stop hate. I do know this. His grandfather killed himself. If you kill him, we know that the chances are that his daughter will kill herself, and perhaps then the circumstances of the circle will be broken. Perhaps not. We do know that you're being asked to take part in a crime against humanity.

I'm often reminded of the story of Lisa Calvalige. Lisa Calvalige grew up in Nazi Germany, and after the war, I had the privilege to meet Lisa Calvalige. Lisa Calvalige after the war met an American G.I. and they fell in love and wanted to get married, and she wanted to emigrate to this country, and before she could do so, they brought her into the Embassy and they asked her several questions and they denied to Lisa her visa or her permit to come to this country, and she inquired why. "Why was I denied the right to come to this country?" And they said, "Because you do not understand the meaning of mass guilt. You do not understand that you as a German people were responsible for Hitler. That you were responsible as a people for the atrocities committed, and to simply say you were following the law and you were following orders is not enough, because there are crimes against humanity that to say, 'We follow the law,' simply doesn't wash." So Lisa

went home and she thought upon the meaning of mass guilt and her responsibility as a person. She wasn't a soldier; she didn't work in a war factory. She was just an average, ordinary, young girl. She thought about the meaning of mass guilt, and she retook the examination. In time she was let in. She came to this country and her husband got a job with IBM, and she lived in a community outside Los Angeles, and she led a fairly normal life like most any other people, and then one day in 1968, Lisa Calvalige put on her Sunday clothes, her high-heeled shoes, white gloves, and she walked down to the port authority where they were loading napalm bombs headed for Viet Nam, and as the truck came down the street, Lisa Calvalige lay down in front of the truck so that the truck couldn't pass. She was arrested and taken to jail, and the news reporters were curious about what happened, about why such a woman would do this. So they interviewed her in the jail, and Lisa said, "Well, during World War II I was only a teenager, and my parents worked in the war factory, and I felt there was no guilt on my part, and then I began to think about mass guilt and my own guilt, and I knew that the day would come when someone would ask my children what role I had played in the killing in Viet Nam," and she said, "I knew then they could say nothing, that they didn't do anything, but the question I didn't want them to ask was, 'Where was your mother when?' "

So today I cast my vote for peace. Today I cast my vote against killing. And that is a vote we all have to cast. We all must cast a vote against killing. It has to stop. For the State to kill is an official act of violence. It teaches others to kill, and as long as the State kills, there will be other deaths. As long as the State acts in an inhuman way and doesn't hold itself up to the highest standard of humanity, and as long as the State doesn't say that non-violence must

always oppose violence, no matter what the circumstances, then we all stand in danger.

This country has an act known as the McCartle Act. It ws developed in the 1950's, and out of the McCartle Act, they created nine concentration camps, and on the order of the President, under the McCartle Act, those people who are a danger to this country may be locked up without a trial, and I think you know who is going to be locked up.

MR. CAUDILL: OBJECTION.

THE COURT: SUSTAINED.

MR. PAUL: And that will happen unless we cast our vote for a better way, unless we vote for non-violence. You know, until justice rolls down like a mighty stream and until justice cleanses us all and until love replaces hate and until we all can sit down at the brotherhood table together and partake of the fruit of life, not of death, then when they send you back in that room with a pen and they ask you to sign a death warrant, you not only sign like Mike McDougall's death warrant; you sign all of us's death warrants, and I weep for that today because I know — I have seen it happen.

I was in Bobway sometime back in Africa to aid in the development of a new government and Golyn Moses Begun (phonetic) and the one thing that everybody agreed on was that a new nation had to make a statement to the world.

MR. CAUDILL: OBJECTION.

THE COURT: SUSTAINED.

MR. PAUL: And that statement —

MR. CAUDILL: OBJECTION.

THE COURT: SUSTAINED.

MR. PAUL: And the statement you have to make—

MR. CAUDILL: OBJECTION.

THE COURT: OVERRULED.

MR. PAUL: And the statement you have to make to the

world as a new nation is that the death penalty is gone. That we're looking to a better world, a better way of living, a world that the death penalty has no place in. In those countries of the world that have retained the death penalty –

MR. CAUDILL: OBJECTION.

THE COURT: SUSTAINED.

MR. PAUL: I would like to read to you now, and I'm not a person, I have to tell you, that reads the Bible, because I don't find a whole lot of answers there because I find the Bible is often diverted. As Mark Twain said, "The Bible was quoted as proof that there should be slavery, and any book that can be so misquoted, I do not prefer to use." But there is one phrase in the Bible that I have always remembered since I was a kid because it's out of that phrase that I became involved in the Civil Rights Movement. I would like to read that to you.

"In seeing the multitudes he went up into the mountains, and when he was set, his disciples came unto him, and He opened his mouth and he taught them," and I think the key word is "taught." "Blessed are they who are poor in spirit, for theirs is the kingdom of heaven. Blessed are they that mourn, for they shall be comforted. Blessed are the meek, for they shall inherit the earth. Blessed are they which do hunger and thirst after righteousness, for they shall be filled. Blessed are the merciful, for they shall attain mercy. Blessed are the pure in heart, for they shall see God. Blessed are the peacemakers, for they shall be called the children of God. Blessed are they which are persecuted for righteousness sake, for theirs is the kingdom of heaven."

One other phrase: "But I say unto you that ye resist not evil but whoever shall smite thee on the right cheek, turn to him the other also, and if any man would sue thee at the law and take away thy coat, let him have thy cloak also,

and whoever shall compel thee to go a mile, go with him three, and go give to him that asketh thee and give to him that would borrow of thee, and turn not away. You have heard that it hath been said that thou shalt love thy neighbor and hate thine enemy." That's the Old Testament, the same Old Testament that says "An eye for an eye." "But I say unto you, love your enemies. Bless them that curse you. Do good to them that hate you and pray for them that do spitefully use you and persecute you."

In all my days in the Civil Rights Movement, when I saw a person who could turn the other cheek, I knew them intimately. I never knew one who was in favor of the death penalty, not a one, and there's a reason for that. When we studied – we did a long study on Nazi Germany to discover why people would turn to Facism and turn to Nazism, and what about their psychological profile made them do that – we found that the dividing line, one of the dividing lines, the main one, was whether or not you're in favor of the death penalty and whether or not you're opposed to it and those people who were in favor of the death penalty are most apt to become Facists, and those people who are opposed to the death penalty, who will resist unjustice, they will resist Facism to the end, and they will die for it.

Another thing that I learned from non-violence is that you must lay your life on the line when another is threatened, and I have stayed awake and I have thought about this all night. I would do anything to save Mike McDougall's life. There is no doubt about that. I'll even let you kill me, and I say to you now and I say to the State, rather kill a sick person, rather than kill this man who is only twenty-three, twenty-four at the time of the crime, and in the whole history of this State, only three other people younger than he have been killed–

MR. CAUDILL: OBJECTION.

THE COURT: OBJECTION SUSTAINED.

MR. PAUL: I would say take me, because I would walk in there proud, knowing that I have saved another life, because I don't think you can hold your head up, stick your chest out, and walk with a spring in your step, proud of yourself, if you kill somebody. But I tell you what. If I die to save another man, I'll walk in there proud, because that's my job, and that's the job of any freedom fighter, and that's the job of any devotee of non-violence, and I know that I have gone on and on, and I know that some of you don't like it. And I know that some of you have already made up your mind and I feel sory for you, because if you're that inhuman, if your heart is closed that much, then you will walk away form here and you won't remember it until one day and it comes back on you, and believe me, it will come back on you, because I've seen that, too. And I've dealt with people in the non-violent struggle, the Civil Rights Movement, who are hard-hearted, and I know we have to go after them again and again, and I know somewhere in each of you there is a conscience that we can appeal to, and I know that once you let that conscience flow, and once you let that goodness that's in all of you flow, and you don't harden your heart, that you will see that love is superior to hate, and non-violence can beat violence, and we can make this a country and a state that we can all be proud of, but when the day comes when violence is superior, then we have to make other choices, but I hope and I believe that we, working together, can make non-violence superior to violence. That this is one way of doing it. This is our opportunity to do it. This is our opportunity to do as Lisa Calvalige did, cast our vote. Thank you.